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U.S. District Court for the Eastern District of Virginia Finds Bump-Up Exclusion Does Not Preclude Coverage for Underlying Settlement

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By way of brief background, Towers Watson and Willis Group Holdings Public Limited Company announced a "merger of equals" on June 30, 2015. Shareholders from both corporations approved the merger on December 11, 2015 and the transaction was completed on January 4, 2016. Following the completion of the transaction, multiple class action lawsuits were filed alleging that the proxy materials provided to shareholders prior to the vote omitted certain information and that, as a result, the shareholders received inadequate consideration for their shares. Ultimately, the class action lawsuits settled for a total of $90 million and the policyholders sought coverage for the settlement from the defendant insurers.

While the defendant insurers did not contest that the underlying actions qualified as "Claims" under the policies and had proffered defense costs prior to the settlement, they asserted that a Bump-Up Exclusion in the primary policy excluded indemnity for the settlements.[2] Not surprisingly, coverage litigation between the policyholders and the defendant insurers regarding the applicability of the Bump-Up Exclusion followed.

The dispositive issue for the court was whether the Bump-Up Exclusion unambiguously applied, thus excluding the settlements from the definition of a covered "Loss."[3] In accordance with Virginia law, the court set out to construe any ambiguity in the exclusion "most strongly" against the defendant insurers and to maximize coverage for the insured. To make its determination, the court critically analyzed the primary policy's language, the specific structure of the transaction that resulted in the merger, and how such a merger would be characterized under corporate law.

As the term "acquisition" was undefined in the policy, the defendant insurers urged the court to adopt the "plain and ordinary meaning" of the term (*i.e.*, "the act of acquiring something" or "to come into possession and control, often by unspecified means") and argued that the transaction in question was "a triangular merger involving a 'qualified stock purchase' of Towers Watson." In rejecting the defendant insurers' argument, the court found the structure of the transaction to be "hardly comparable to the straightforward takeover of one company by another . . . and therefore is reasonably viewed as something other than 'the acquisition' referenced in the Bump-Up Exclusion."[4]

In reaching its decision, the court, though applying Virginia law to the dispute, borrowed heavily from Delaware law. In particular, the court relied heavily on a recent Delaware case, *Northrop Grumman Innovation Systems, Inc. v. Zurich American Insurance Company*,[5] in which that court rejected the defendants' argument that a similar Bump-Up Exclusion applied to a reverse triangular merger because the transaction "involved" an acquisition of stock. Following the analysis and narrow contract interpretation principles set out in *Northrop*, the Eastern District of Virginia took great pains to distinguish the subject merger from the undefined term "acquisition" in the primary policy and held that the language of the Bump-Up Exclusion did not apply to the merger between Towers Watson and Willis.

Although the court in *Towers Watson* held that the Bump-Up Exclusion did not unambiguously exclude coverage under the facts of the case, it did not hold, or even suggest, that the exclusion would not apply under different circumstances. Thus, insurance carriers faced with a Bump-Up claim should continue to carefully examine the language of the Bump-Up Exclusion at issue, the nature of the

transaction, and the law to be applied to the dispute.

If you have questions or would like additional information, please contact Justin K. Fortescue (fortescuej@whiteandwilliams.com; 215.864.6823) or Andrew L. Blacker (blackera@whiteandwilliams.com; 215.864.6841).

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[1] *In re Willis Towers Watson plc Proxy Litigation,* Case No. 1:17-cv-01338 (E.D. Va.) (the "Virginia Action) and *In re Towers Watson & Co. Stockholders Litigation*, Consolidated C.A. No. 2018-0132-KSJM (Del. Ch.) (the "Delaware Action").

[2] The Bump-Up Exclusion in the Policy provided:

In the event of a **Claim** alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate, **Loss** with respect to such **Claim** shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased; provided, however, that this paragraph shall not apply to **Defense Costs** or to any **Non-Indemnifiable Loss** in connection therewith.

[3] "Loss" includes "damages, settlements, judgments [subject to the Exclusion set forth in the Bump-Up Exclusion]...[and] Defense Costs." (Primary Policy Page ID 599.)

[4] *Towers Watson*, 2021 U.S. Dist. LEXIS 192480 at 27-28.

[5] No. CV N18C-09-210, 2021 WL 347015 (Del. Super. Ct. Feb. 2, 2021)